MALAYSIAN REPORTS

LEE GUAT ENG v. TAN LIAN KIM

[S.C. (Hashim Yeop A. Sani, Syed Agil Barakbah & Wan Hamzah S.C.JJ.) February 25 & March 5, 1985]

[Kuala Lumpur – Federal Court Civil Appeal No. 240 of 1984]

Practice and Procedure – Appeal – Application for extension of time to serve memorandum of appeal and appeal record on respondent – Discretion – Matters to be considered – R.H.C. 1980, O.55 rr. 2 & 4(3).

In this case the appellant had filed the notice of appeal and served it within time. He had also filed the memorandum of appeal within time but had failed to serve the memorandum of appeal and the appeal record on the respondent's solicitors within 14 days of the receipt of the notice in Form 141 of the Subordinate Court Rules, 1980. The appellant applied for extension of time but this was refused. He appealed.

Held, the court has a wide discretion in granting or refusing extension of time under Order 55 rule 4(3). In the circumstances of this case the application for extension of time should have been allowed.

Cases referred to:

(1) *Ratnam* v. *Cumarasamy* [1965] 1 M.L.J. 228; [1965] 1 W.L.R. 8, P.C.
(2) *Haji Mohamed bin Suboh* v. *Devadas* [1981] 1 M.L.J. 136.
(3) *Veerasingam* v. *Public Prosecutor* [1958] M.L.J. 76, 79.
(4) *Jones* v. *Curling* 13 Q.B.D. 262.
(5) *Cheah Teong Tat* v. *Ho Gee Seng & Ors.* [1975] 2 M.L.J. 149, 150.
(6) *New India Assurance Co.* v. *Karam Singh* Muar Civil Appeal No 1 of 1970.
(7) *Liew Chee Tat* v. *Loke Moon & Ors.* [1972] 2 M.L.J. 29.
(8) *J.L.J. Selvam* v. *Mehta & Anor.* [1980] 2 M.L.J. 144.
(9) *Gan Hay Chong* v. *Siow Kian Yuh & Anor.* [1975] 2 M.L.J. 129.

SUPREME COURT.

Yusuf Khan for the appellant.
Humfrey Ball for the respondent.

Cur. Adv. Vult.

Hashim Yeop A. Sani S.C.J. (delivering the Judgment of the Court): Before us the appellant appealed against the refusal of the Judge to allow an extension of time to serve the memorandum of appeal and the appeal record on the respondent.

The notice of appeal originally filed with the High Court Melaka was against the dismissal of an application to set aside a default judgment and the execution order. The application was dismissed on September 28, 1983 whereupon the appellant filed the notice of appeal. The appellant was subsequently served with the notice in Form 141 (that the appeal record was ready) on May 21, 1984. He filed in court a memorandum of appeal and appeal record on May 29, 1984 but did not however serve the same on the respondent until June 20, 1984. Thus it is clear that the notice of appeal was filed and served within time. The memorandum of appeal was also filed within time. It was only the service on the respondent's solicitors of the memorandum of appeal and the appeal record which was not done within 14 days of the receipt of the notice in Form 141 of the Subordinate Courts Rules, 1980.

In an appeal of this nature the principles to be observed are as set out in *Ratnam* v. *Cumarasmy*.[1] The rules of the court must *prima facie* be obeyed and that there must be some material upon which the court can exercise its discretion in extending time. There is also a presumption that the Judge had exercised his discretion correctly. This presumption is however rebutted if the appellate court is satisfied that the discretion has been exercised on wrong principles or otherwise improperly exercised or that there has been a miscarriage of justice. The real issue in *Ratnam* v. *Cumarasamy* was whether the court of appeal was right in dismissing the application and thereby putting an end to the proceeding and barring the appellant from pursuing his undoubted right of appeal when his only fault was that he was a short while out of time in complying with the procedural step in filing the record of appeal.

Order 3 rule 5 of the Rules of the High Court 1980 gives the court discretion to extend time. The court may extend or abridge the period within which a person is required by the rules to do any act on such terms as the court may think just. The word "just" would appear to enable the court to neutralise the rigidity of the rules in appropriate cases. I would rather that we look at it as Lord Guest said in *Ratnam* v. *Cumarasamy* that adherence to the rules are merely to provide a "time-table for the conduct of litigation." The rules should not be used to shut out litigants in every case of non-compliance.

In *Haji Mohamed bin Suboh* v. *Devadas*[2] the Federal Court approved the exercise of judicial discretion as described by Thomson C.J. in *Veerasin-*

gam v. *Public Prosecutor*[3]. The court of appeal in that criminal reference was asked to set out the powers, principles and procedure governing the grant of extension of time and the lodging of petition of appeal and the permitting of amendments to a petition of appeal by the addition of further grounds or otherwise. Following Bowen L.J. in *Jones* v. *Curling*[4] the Court of Appeal refused to lay down a hard and fast rule on which the discretion should be exercised when an Act of Parliament or rule which creates the discretion gives it in ample and unqualified terms.

The court has in fact a wide discretion in granting or refusing extension of time under Order 55 rule 4(3) provided the discretion is properly exercised. It is to be noted however that the Subordinate Courts Rules 1980 do not provide for the time limit for serving the memorandum and record of appeal on the respondent which omission brought forth some discussions before. Thus at page 150 of the Federal Court judgment in *Cheah Teong Tat* v. *Ho Gee Seng & Ors.*[5] there was a reference to the judgments of the late Sharma, J. in *New India Assurance Co. Ltd.* v. *Karam Singh*[6] and *Liew Chee Tat* v. *Lok Moon & Ors.*[7] on the reasonable period for service. The time limit was in Order 59 rule 2(2) of the old Supreme Court Rules, 1957 and is now in the High Court Rules 1980 – Order 55 rule 2(2). The practicality of Order 55 rule 2 of the Rules of the High Court, 1980 is however questionable. Apparently this has given a lot of difficulties to practitioners. Since time begins to run from the date of receipt of Form 141, there will be problems if the record is not made available immediately upon or soon after the receipt of Form 141 or if the record does not contain the grounds of decision of the magistrate. These difficulties were highlighted by Mr. K.S. Dass in his article appearing in [1982] 2 M.L.J. xxxv.

After reading the judgment of the trial Judge we felt that the appeal should be allowed on a number of grounds.

(1) First it would seem from the judgment that the trial Judge misapprehended the application before him. It was an application for an extension of time to serve the memorandum of appeal and appeal record on the respondent whereas the filing in court of the same had been done well within the prescribed time.

(2) The trial Judge would also appear to have misunderstood the date on which the notice on Form 141 was served on the appellant. He came to the conclusion that the appellant was clearly 19 days out of time whereas it was only 15 days out of time. Even the date the record of appeal was first made available to the appellant's solicitors to enable the memorandum of appeal to be prepared would seem to be in dispute for the notes of the proceedings say that the record was served on the appellant's solicitors only on June 7, 1984. The Federal Court in *J.L.J. Selvam* v. *Mehta & Anor.*[8] considered delay in availability of court records sufficient ground to exercise discretion in favour of allowing the extension in an application for special leave under rule 73 of the Civil Appeals (Transitional) Rules, 1963.

(3) It is also not clear whether the trial Judge viewed the application on the basis of a *special* leave or ordinary leave as he cited cases both for special leave and ordinary leave. It is clear that for special leave a higher burden is imposed on the applicant. There is no question of *special* leave here.

He said in the judgment he relied solely on *Gan Hay Chong* v. *Siow Kian Yuh & Anor.*[9] and *Haji Mohamed bin Suboh* v. *Devadas.* The former dealt with the failure to file the memorandum of appeal within time. The latter dealt with special leave under the Federal Court (Civil Appeal) (Transitional) Rules, 1963.

(4) Finally the trial Judge purported to rely on Order 55 rule 4(3) of the Rules of the High Court 1980 and said that if the applicant could not show sufficient grounds the appeal must be dismissed. The words used in Order 55 rule 4(3) is not "must" but "may".

(5) Lastly the trial Judge would appear to have overlooked the fact that being a judgment in default the case was never argued on the merits but he nevertheless concluded that the appellant "had little or no chance of success" as one of the grounds for refusing the extension of time.

Appeal allowed.

Solicitors: *Yusuf, Gulam, Lee & Co.; Humfrey Ball.*